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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial report of States parties due in 1995

Addendum

Namibia

[7 August 1996]

CONTENTS

	Paragraphs	Page
Introduction	1 - 4	3
Information relating to each article of Part I of the Convention	5 - 20	4
Article 1	5	4
Article 2	6 - 7	4
Article 3	8 - 15	5
Article 4	16	6
Article 5	17	6
Article 6	18	8

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CONTENTS (continued)

	Paragraphs	Page
Article 7	19 - 20	8
Article 8	21	9
Article 9	22	9
Article 10	23	9
Article 11	24 - 29	9
Article 12	30 - 37	11
Article 13	38 - 39	19
Article 14	40 - 41	19
Article 15	42	20
Article 16	43 - 44	20
Conclusion	45	20
List of annexes		21

Introduction

1. With regard to that part of the report concerned with the general information to be submitted in compliance with the consolidated guidelines for the initial part of reports of States parties to be submitted under the various international human rights instruments, members of the Committee are referred to the core document of Namibia.

2. Namibians were routinely tortured and assaulted by South African and South West Africa Territory Force soldiers and by members of the South West African Police during the illegal occupation of Namibia by South Africa. After independence, and in accordance with the Government's policy of national reconciliation, many Namibian members of these forces remained in the employ of the Namibian Defence Force and the Namibian Police. It was to cure the mischief of the erstwhile colonial experience that article 8 (2) (b) of the Namibian Constitution was included in the Constitution by its drafters. Under article 8 (2) (b) of the Namibian Constitution, which came into force on the date of independence, 21 March 1990, torture is prohibited. Article 8 is entitled "Respect for human dignity". Article 8 (2) (b) provides:

> "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

3. This article forms part of the justiciable Bill of Rights of the Namibian Constitution. And in the terms of article 24 (3), freedom from torture is one of the human rights which are not derogable. So a derogation from or a suspension of this human right is not permitted whether or not a state of national defence or a period of a declaration of emergency is in force.

4. Although this Convention has not been incorporated in any national law, since torture is prohibited by the Constitution, freedom from torture is guaranteed by the Constitution, which, according to article 1 (6) is "the Supreme Law of Namibia". This right as intimated above, is wholly justiciable. Besides, it is possible to invoke the Convention in a court of law or any tribunal, in addition to the constitutional provision, because international agreements binding on Namibia are self-executing. In this sense, the courts will give effect to the provisions of the Convention as implementation does not require a change in the existing law. Indeed, the purpose of the Convention is also contained in the above-quoted provisions of the Constitution, so there will be no difficulty in the courts giving effect to the Convention. There is at present no case before the Namibian courts specifically on the applicability of treaties and other international agreements binding on Namibia as forming a part of the laws of Namibia, but the courts are likely to hold that the provisions of such treaties and other international agreements that are self-executing because of their nature are part of the laws of Namibia. Be that as it may, the Minister of Justice has already requested technical assistance from the Centre for Human Rights to assist the Ministry in drafting various statutes that will incorporate some international human rights instruments in the laws of Namibia.

Information relating to each article of Part I of the Convention

Article 1

5. There is no national legislation prohibiting torture, as has been mentioned earlier. Rather, torture is prohibited under the Constitution. Torture is not defined by the Constitution, so it can safely be assumed that in a case in which the definition of torture becomes an issue, the definition in article 1 of the Convention will be given judicial recognition and will be used as an aid to interpretation. In order to reinforce the abolition of torture or cruel, inhuman or degrading punishment or treatment perpetrated by or upon the authority of an organ of State, the Supreme Court of Namibia declared corporal punishment imposed and inflicted by or upon the authority of a State organ to be illegal in the landmark case of Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State (Annex 1).

Article 2

6. Any instance of torture is considered as a criminal or a civil wrong attracting criminal or civil proceedings. The matter is therefore dealt with as a crime or the victim can sue in civil as opposed to criminal proceedings (Annex 2). When it comes to torture, particularly State-sponsored torture, it is the law enforcement agencies, for example, the police, that are most in need of control. The Namibian Police has laid down administrative directives aimed at preventing torture from occurring in the police force. These instructions are used as teaching material during training and are included in the service manual used by police personnel (see Annex 3).

7. Members of the police force who investigate allegations of assault or inhuman treatment by policemen or women are usually not stationed at the same police station where the alleged offender is stationed. Each police region has specially appointed members to investigate such charges. The investigations are controlled at the national level by one division, namely the Complaints and Discipline Division. Owing to lack of personnel, it is not possible to investigate cases as quickly as desirable. It is felt by the Legal Assistance Centre (LAC) (see Annex 4) that the existing procedure for investigating and prosecuting complaints against members of the Namibian Police is inadequate. The Government will have to look into the establishment of an independent police complaints authority, with sufficient funds and personnel to deal with all complaints that are laid against members of the Namibian Police. In this context, all allegations of assault made against members of the Namibian Police would first be dealt with as disciplinary offences, without awaiting the outcome of criminal proceedings. But it is the considered view of the Police Department that criminal charges are more serious than disciplinary proceedings and that is why disciplinary measures are only taken after a criminal case has been finalized (that is in cases where criminal proceedings have been instituted); and, more importantly, the image of the Police Department will be seriously tarnished if a member is disciplined and in the end he or she is acquitted in a court of law for the same alleged offence.

Article 3

8. At independence Namibia inherited the Extradition Act, Act No. 67 of 1962, a piece of South African legislation made applicable to Namibia. Because the Act was promulgated during the apartheid era in South Africa, Namibia has drafted a new Extradition Bill (Annex 5) which will be passed into law shortly. This law will inter alia, repeal the 1962 South African Extradition Act.

9. Namibia has not signed an extradition agreement with any country.

10. Under the bill, the Minister of Justice will be responsible to determine extradition or refoulement of a person after a request has been examined by a magistrate. The person whose extradition or refoulement is being requested or the Government of the requesting country may, within 14 days from the date of a magistrate's order committing the person in question to prison to await the Minister's decision concerning return to the requesting State, appeal to the High Court against the decision of the magistrate.

11. In considering such an appeal, the High Court may order the discharge of the person who has been committed to prison awaiting extradition or return, if it is the opinion of the High Court that, having regard to all the circumstances of the case, it would not be just to return such person because, inter alia, that he or she would be or might be liable to the death penalty or any other type of punishment that is not applied in Namibia if he or she were returned, unless the requesting country guarantees, to the satisfaction of the Government of Namibia, that the death penalty or such other type of punishment will not be imposed or, if imposed, will not be carried out. Such other punishment includes torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 8 (2) (b) of the Namibian Constitution.

12. In terms of the law no person may be expelled from Namibia unless such expulsion or removal from Namibia has been authorized by an immigration tribunal. Section 43 (1) of the Immigration Control Act, Act No. 7 of 1993, provides:

> "For the purposes of the provisions of Article 11 (4) of the Namibian Constitution, the Minister shall establish so many tribunals to be known as immigration tribunals as the Minister may deem desirable for the hearing and determination of applications for authorization for the removal of persons from Namibia in terms of this Act or any other law."

And article 11 (4) in the relevant part provides that an illegal immigrant in Namibia "shall not be deported from Namibia unless deportation is authorized by a Tribunal empowered by law to give such authority". The tribunal will take into account all relevant facts, including the likelihood of the person to be deported being tortured in the country to which he or she may be expelled. If there is this likelihood, then the person will be referred to the agency responsible for refugees to determine whether such a person should be given refugee status. This agency usually seeks advice from the Ministry

of Foreign Affairs. Namibia has yet to enact a law dealing with refugees, although Namibia provides asylum to a considerable number of persons, particularly Angolans. This omission makes it difficult for persons seeking asylum to assert their rights.

13. In the experience of the Legal Assistance Centre (LAC), the immigration tribunal deals with approximately 50 to 130 cases in one sitting. The immigration authorities usually respect the status of refugees, although LAC is aware of a recent case in which an Angolan refugee, Peso Salvador Rogerio, was deported to Angola. LAC is of the view that it is unlikely that a claim for refugee status before the immigration tribunal would be seriously considered by it. Failure to apply for refugee status at a very early stage counts heavily against an asylum-seeker and he or she is likely to be returned to his or her country of origin, unless legally assisted. In a case dealt with by LAC at the beginning of 1996, the Ministry of Home Affairs refused to consider an application for refugee status by a Nigerian national, Brian Prince Soetan, allegedly because he had remained in Namibia illegally after his temporary residence permit expired. The Ministry only undertook to consider his application after application was made to the High Court. The absence of domestic legislation dealing with refugees made his case difficult.

14. The Minister of Home Affairs may set aside a decision by an immigration tribunal to authorize the expulsion of a person from Namibia. The tribunal may of its own motion, and shall at the request of the applicant, reserve for the decision of the High Court any question of law which arises upon an application heard by the tribunal. If the applicant or the Chief Immigration Officer is aggrieved by a decision of the High Court, he or she may appeal to the Supreme Court.

15. A person is entitled to legal representation during the hearing of his or her case by the tribunal or during an appeal in the High Court. An indigent person may apply for and receive legal assistance and representation from the Legal Aid Department of the Minister of Justice or from LAC.

Article 4

16. All acts of torture or cruel, inhuman or degrading treatment or punishment are considered common-law offences; that is to say they are not regulated by statute. The law on attempt to commit a crime or conspiracy in the carrying out of a crime applies to both common-law and statutory crimes. The court has discretion to sentence a person convicted of torture to a term of imprisonment or a fine. The severity or otherwise of the punishment will depend upon how grave and depraved the act was. For instance in The State v. Michael Matroos, the accused, a police officer, was charged with torturing a suspect to death. The court felt bound to order a custodial sentence "in order to emphasize the strong disproval of this Court" (Annex 6).

Article 5

17. There is no specific legislation making it necessary for Namibia to establish its jurisdiction in cases of torture committed or attempted aboard a ship or aircraft registered in Namibia. In fact, the issue has not come up for judicial determination in Namibia. But, as has been mentioned in

paragraph 6, any instance of torture is considered a crime and therefore, if committed within the territory under the jurisdiction of Namibia, the courts have jurisdiction to try the case as they would with regard to any other crime. If torture, which will be considered an extraditable offence in the proposed Extradition Bill, is committed by a Namibian citizen in another country and such Namibian citizen is found in Namibia, then the Namibian citizen may be tried in Namibia under clause 6 of the Bill.

Clause 3 of the Extradition Bill provides:

> "For the purpose of this Act 'extraditable offence' means an act, including an act of omission, committed within the jurisdiction of a country contemplated in section 4 (1) which constitutes under the laws as of that country an offence punishable with imprisonment for a period of 12 months or more and which if it had occurred in Namibia would have constituted under the laws of Namibia an offence punishable with imprisonment for a period of 12 months or more."

In determining whether any conduct constitutes an extraditable offence, all the surrounding circumstances pertaining to such conduct shall be taken into account, and it shall not matter that:

(a) The terminology which denotes the offence is not the same as, or that the conduct constituting the offence is not placed in the same category as, or that the constituent elements of the offence differ from, a similar offence in Namibia; or

(b) The offence for which the extradition is sought pertains to taxation, customs duty, exchange control, or any other form of fiscal regulation which is not enforced in Namibia.

And clause 6 provides:

> "(1) A Namibian citizen may be prosecuted and punished in Namibia in accordance with the laws of Namibia for any extraditable offence which such Namibian citizen may have committed or is accused or having committed within the jurisdiction of a country contemplated in section 4 (1), but no such prosecution shall be instituted unless:
>
> (a) A request for the return of that person has been made in accordance with the provisions of this Act; and
>
> (b) The Prosecutor-General has in writing authorized the institution of such prosecution.
>
> "(2) For the purpose of determining the jurisdiction in relation to proceedings under subsection (1), the conduct constituting the offence shall for all purposes connected with or consequential to the trial of such offence be deemed to have been committed within the magisterial district of Windhoek."

Article 6

18. If it becomes necessary to proceed against a person alleged to be a torturer, the relevant provisions of the extradition law will be invoked. Clauses 7 to 17 of the Extradition Bill provide for the procedure to be followed to give effect to requests for return of claimed persons, the authority to issue warrants for their arrest, examination by a magistrate, committal proceedings, the power of the Minister of Justice to grant extradition requests, and appeals against the decision of a magistrate to commit such persons pending the decision of the Minister to grant extradition. There has been no actual case involving an alleged torturer.

Article 7

19. If a person alleged to have committed an offence referred to in article 4 is found in Namibia and he or she is claimed by another country the matter will be dealt with according to Namibia's extradition law. If the person is a national of Namibia and he or she committed the alleged offence in a requesting State, he or she will be tried under Namibia's criminal law, as has already been mentioned.

20. Like any accused person undergoing a criminal trial in Namibia, such a person's right to a fair trial will be protected under article 12 of the Namibian Constitution. Article 12 provides:

"(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and component Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgements in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No person shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of article 8 (2) (b) hereof (prohibition of torture).

(2) No persons shall be liable to be tried, convicted or punished again to any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-article shall be construed as changing the provisions of the common law defences of 'previous acquittal' and 'previous convictions'.

(3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed."

Article 8

21. As mentioned in paragraph 16 above, torture and other cruel, inhuman or degrading treatment or punishment will be considered an extraditable offence if the particular act meets the requirements of clause 3 of the Extradition Bill. In terms of the proposed legislation, three categories of requesting States are envisaged, namely a requesting State which has an extradition treaty with Namibia; a requesting State which is a member of the Commonwealth and which has designated Namibia as a reciprocal State in terms of the Commonwealth Scheme for the Rendition of Fugitive Offenders; and requesting States whose request for extradition is left to the discretion of the President to grant because there is neither an extradition agreement existing between that requesting country and Namibia nor is the requesting country a designated Commonwealth country.

Article 9

22. There is no legislation on judicial or legal assistance neither has Namibia entered into any such scheme on a reciprocal basis with any other country with regard to offences under this Convention.

Article 10

23. Training materials used in the training of personnel of law enforcement agencies seek to bring to the attention of the trainees the prohibition against torture (see annex 3). In addition, the relevant provisions of the Namibian Constitution outlawing torture are explained to the trainees.

Article 11

24. There is a system in place for receiving and dealing with complaints from inmates in prisons and police lock-ups.

25. An inmate of a prison or police lock-up can complain to a medical officer appointed to supervise prisons and lock-ups concerning any torture or inhuman treatment at the hands of a prison official. Section 6 of the Prisons Act, 1959 (Act No. 8 of 1959), as amended by section 7 of the Prisons Amendment Act, 1981 (Act No. 13 of 1981), provides:

> "(1) For every prison there shall be a medical officer who shall perform such duties as are assigned to him or her by or under this Act.
>
> "(2) The Administrator-General [now the President] may, subject to the laws governing the Government Service [now the Public Service], appoint for any prison or group of prisons a medical officer who shall be a resident medical officer whose whole time shall be given to the duties of the post to which he has been appointed.
>
> "(3) If no medical officer has been appointed for any prison as provided in subsection (1) or if the post of medical officer at any prison is terminated or vacant, the duties assigned to the medical officer of such prison by or under this Act shall be performed by the district surgeon for the area in which the prison is situated, or by such other medical practitioner as has been approved for the purpose by the Secretary for National Health and Welfare (now Permanent Secretary, Health and Social Services)."

26. Members of the Prison Service other than officers who are convicted of assaulting prisoners may, in addition to any other penalty, be discharged from the service. Should a member be found guilty, sentenced to any period of imprisonment and discharged, he can never be reappointed as a member of the Prisons Service. Penalties such as fines can also be imposed on the said members.

27. Every morning at "unlocks" a senior officer, most appropriately the head of prison, accompanies the unlock group to receive complaints and requests and to inspect the prison. He sees to it that no junior members are involved in mistreating prisoners. In the absence of the head of prison, a competent officer assumes this responsibility. Prisoners use this opportunity to put their complaints to the prison authorities, including complaints of assaults, should there be any. Prisoners' complaints are also channelled through prison social workers to the heads of prisons, who further channel the complaints to the Commissioner of Prisons. Investigations take place internally, but should there be evidence that the case is criminal, the police are involved for outside court case procedures. In addition, by convention, a magistrate is empowered to visit prisons regularly every one to four weeks, depending upon where the particular prison is situated, to inspect prisons and police lock-ups and to listen to prisoners' complaints, particularly of any acts of torture and cruel, inhuman or degrading treatment at the hands of prison officers or policemen or policewomen. Where an allegation of torture is made, the magistrate has the power to order an investigation of the complaint and the prosecution of the alleged torturer.

28. With regard to the police, LAC is of the view that the existing procedures in respect of persons in police cells are both inadequate and not fully applied. While the standing orders of the Namibian Police provide for a number of safeguards as mentioned above, such as cell visits every hour and the noting of complaints, the only compliance in most cases seems to be that the member on duty makes an entry in the occurrence book that such inspections were carried out. LAC has therefore suggested that the English system of custody officers be adopted. These officers would be directly responsible for the welfare of persons in their custody. Such a scheme would go a long way towards monitoring sufficiently the removal of detainees from their cells for interrogation and also ensuring that they are adequately examined by more senior police officers on their return from interrogation. There should also be a system of police cell inspections carried out on a regular basis by independent persons, such as judges, magistrates, lawyers or by lay persons.

29. With regard to prisons, LAC has noted that the Prisons Act, Act No. 8 of 1959, provides an inadequate complaints procedure. For instance, in the terms of regulations promulgated under the Act, a prisoner can be penalized for lodging false, frivolous or malicious complaints. LAC has also noted that magistrates do not visit prison cells regularly and that the act only states that every prison shall be inspected by commissioned officers "at such time as the commissioner may determine". There is therefore no provision for independent inspection.

Article 12

30. As has been mentioned passim in this report, there is no specific legislation dealing particularly with torture. Torture perpetrated by a state agency, for example, the Police Department, is treated as a breach both of departmental rules and of criminal law. If torture is alleged against any policemen or policewomen, the case will be investigated internally by the Police Department and appropriate measures taken against the perpetrator of the offence if the case against him or her is proven.

31. If the act merits criminal investigation, then the complaint is investigated by the criminal investigation department of the police force. A case docket is opened and all material facts are placed before the Prosecutor-General who under the terms of article 88 of the Namibian Constitution has final responsibility to prosecute any case in the name and on behalf of the Republic of Namibia. He or she therefore has discretion in determining whether there are sufficient grounds to institute prosecution against the alleged torturer. If he or she decides to prosecute then criminal charges are laid against the alleged offender. The case then goes for a criminal trial. Depending upon the seriousness of the act in question, the case may be tried in either a magistrate's court or in the High Court. The matter of The State v. Michael Matroos, referred to in paragraph 16, is a case in point.

32. In the same vein, if the complaint of torture is levelled against a member of the Prisons' Department or the Defence Force, an internal

departmental inquiry will take place and appropriate measures taken against the official in question. But if the act complained of is a serious one warranting the institution of a criminal charge, then the procedure briefly surveyed in paragraph 26 above is set in train.

33. Section 14 of the Prisons Act, 1959 (Act No. 8 of 1959), as amended by section 10 of the Prisons Amendment Act, 1981 (Act No. 13 of 1981) provides:

> "Any member of the Prisons Service other than an officer who is convicted for assaulting any prisoners may, in addition to any other penalty imposed therefor, be discharged from the service of the Prisons Services; and if he has been sentenced for an offence to a fine exceeding 100 Rands [now Namibian dollars] or to any period of imprisonment without the option of a fine and has been so discharged shall in no circumstance be reappointed a member of the Prisons Service."

Assault is considered an offence under article 4 of the Convention. A different procedure is followed in the case of alleged misconduct of officers. In the terms of the Prison Act, 1959, as amended, misconduct includes any offence, which in turn will include an offence within the meaning of article 4 of the Convention.

34. As far as an officer is concerned, if a case of misconduct is proven after proceedings before a board of inquiry, the Minister of Prisons and Correctional Services may, after considering the board's report and recommendations and those of the Commissioner of Prisoners, discharge or retire the officer or reduce him or her in rank.

35. The acts described here may not amount to torture <u>in sensu stricto</u>, yet they are forms of cruel treatment within the meaning of article 1. The following cases were reported by the Prisons Department:

(i) Windhoek, May 1991

An officer was suspended and finally dismissed after assaulting two prisoners. He was later found not guilty in a magistrate's court after a criminal charge was laid.

(ii) Windhoek, April 1995

A prisoner alleged he was assaulted by an officer and pushed to the ground. He complained to the Office of the Ombudsman. According to witnesses, this prisoner was busy passing insults at the officer and pounced to hit the officer with a clenched fist. The officer acted in self-defence by grabbing the prisoner and pushing him to the ground.

(iii) Windhoek, 1995

Prisoners awaiting trial complained they were forced every morning to strip naked and perform a dance. Investigations proved the allegations to be false. Prisoners wrote to the press to make the picture of the searching of prisoners look ugly. Prisoners are searched according to the manner

prescribed, which by all means protects their human dignity. A prisoner is searched naked, but in a room with only the officer who is doing the searching. Women are searched by female officers.

(iv) Walvis Bay 1995

In another incident a prisoner alleged to the Office of the Ombudsman that he was assaulted by an official. Investigations proved that this prisoner was refusing orders: (a) to move from the cell and (b) to stand up with other prisoners. He made serious threats against officers, who were left with no alternative but to force him to obey orders by applying minimum force. He was later isolated because he proved to be dangerous to other prisoners.

(v) Omaruru, October 1994

A prisoner wrote to the Office of the Ombudsman alleging that he had been assaulted by prison officers. Internal investigations showed that the allegations were unfounded. This was supported by the Ombudsman's own findings.

(iv) Hardap, November 1992

A prisoner who refused orders from a warder alleged he was assaulted when the warder forced him to go back to his section. Investigations concluded that the prisoner refused to carry out lawful orders and necessary minimum force was the only alternative. The prisoner has complained to the Ombudsman.

36. The following cases have also been documented by LAC. (In order to give some idea of the amounts of money involved it should be noted that 1 US dollar = approximately 4.4 Namibian dollars.)

(i) Elifas and Immanuel Hameva

Elifas and Immanuel Hameva, who are brothers, were arrested at Omafo, Uukwanyama (northern Namibia) on 16 May 1991 on suspicion of being involved in the murder at Okahandja of a police officer, Frederick Frey.

The two brothers were taken to the Ondangwa police station. During the morning of 17 May 1991, Elifas Hameva was taken from the police cell and interrogated by two plain-clothes police officers. He was handcuffed with his arms behind his back. He was then throttled by a police officer and thrown on the ground. His head was then beaten against the ground approximately 20 times until blood came out of his mouth. The police officer also pressed his knee into Mr. Hameva's chest in order to keep him on the ground. The assault continued for approximately 45 minutes. Mr Hameva received medical treatment on 22 May 1991 at the Oshakati hospital.

The Hameva brothers were released on 18 May 1991 after the real culprit was arrested.

A civil action for damages was instituted on behalf of both brothers by LAC. The matter was defended by the Namibian Police. Shortly before the trial on 19 October 1994, the matter was settled out of court on the basis of a payment of N$ 5,000 to Elifas Hameva and N$ 2,500 to Immanuel Hameva. The amount paid to Immanuel Hameva was in respect of his unlawful arrest and detention. Criminal charges were not laid against the police officers responsible for the assault, because Elifas Hameva thought that the police would not investigate charges against their fellow policemen. It is not known whether disciplinary proceedings were instituted against the police officers responsible for the assault.

(ii) Andrew Nghikembwa

LAC acted on behalf of Mr. Andrew Nghikembwa in an action instituted against the Namibian Police arising out of an assault by Inspector Haimbili on 2 April 1992 at the Oshakati police station.

Criminal charges were laid against Inspector Haimbili. The Prosector-General made a ruling that Inspector Haimbili could admit guilt and pay an admission of guilt fine of N$ 50. This is a derisory amount. It is not known whether disciplinary proceedings were instituted against Inspector Haimbili.

(iii) Daniel Vries, Lazarus Rooi and Gabriel Manyanga

Daniel Vries, Lazarus Rooi and Gabriel Manyanga were arrested during an operation by the Namibian Police (NAMPOL) to combat stock theft. The operation was carried out in conjunction with the owner of the Hoffnung farm in the Windhoek district. The persons concerned were arrested in the early hours of the morning of 11 January 1993. At the time of their arrest they were employed as general labourers on the said farm.

They were severely assaulted by NAMPOL officers and by the farm owner and foreman. Vries was repeatedly beaten and kicked. He had to be hospitalized as a result of the assault and suffered severe injuries to his groin. The other two were not hospitalized but were also beaten and kicked.

These three persons were charged with stock theft and were acquitted on 28 April 1993. They laid charges of assault with intent to cause grievous bodily harm against both the civilians and the NAMPOL officers. The civilians pleaded guilty and were found guilty. They were sentenced to pay a fine of N$ 500 and N$ 400 respectively. As a result of the fact that the police officers pleaded not guilty, the trials were separated and at the time of writing this report the trial of the police officers had not yet begun. It is not known whether disciplinary proceedings were instituted against the police officers.

LAC instituted a civil claim against both the civilians and the Minister of Home Affairs. The matter was defended and the day before the trial the matter was settled out of court on the basis of a payment to Daniel Vries of N$ 5,500 and to Rooi and Manyanga of N$ 4,000. It is interesting to note that the civilians were only joined as defendants once the trial against the Minister of Home Affairs had been set down. The legal practitioner acting on

behalf of the civilians made an offer of settlement almost immediately after the application for joinder whereas the claim against the Minister of Home Affairs was only settled once the civilians had made their offer of settlement.

(iv) Lesley Mutjavikua

Mr. Mutkavikua was arrested at Windhoek on 7 February 1993 for allegedly being drunk in a public place. The charges against him and one other person were withdrawn without him appearing in court. Mr. Mutkavikua was taken to the Katutura police station, Windhoek. He objected to being arrested and detained, because he was not told why he was being arrested. He was then assaulted by a Constable Daused, who slapped him across the face. Constable Daused also pushed him down a flight of stairs and as a result Mr. Mutkavikua's left knee was severely injured.

Criminal charges were laid against Constable Daused, but the Prosecutor-General decided not to prosecute. It is not known whether any disciplinary action was taken against Constable Daused.

A civil action was instituted against the Namibian Police. The action was defended but settled during April 1996, shortly before the case was due to be heard in the High Court. Under the terms of the settlement, Mr. Mutkavikua was to be paid an amount of N$ 44,969.93 in respect of damages and for past and future medical expenses.

(v) Erastus Kambindu

Erastus Kambindu was arrested at Windhoek on a charge of theft of a firearm on 21 September 1993. The arresting officer was a certain Mike Kawazunda. Mr. Kambindu was then detained at the Katutura police station, Windhoek.

A civil action was instituted against the Namibian Police, which was defended. The matter was settled out of court by the payment to Mr. Kambindu of N$ 6,000.

Criminal charges were laid against Mike Kawazunda. A succession of investigation officers showed little interest in the case. Mr. Kawazunda was finally brought to court on the criminal charges during 1995. He was convicted of assault and sentenced to a fine of N$ 150 or 30 days' imprisonment on 13 December 1995. We are of the opinion that this is a very light sentence for someone who abused his authority as a police officer to assault a prisoner in his custody.

We are not aware of any disciplinary proceedings being instituted against Mr. Kawazunda, although we understand that he has since been dismissed from the Namibian Police for unrelated reasons.

(vi) Johannes Amesho

This matter also involved a police assault. The trial has been set for 17, 18 and 19 September. Mr. Amesho was arrested and severely assaulted in

the charge office and the cells at the Katutura police station by three police officers. The incident occurred on 18 November 1993. As a result of the assault he sustained haemorrhagic pancreatitis and was hospitalized for several weeks. He will also have to be on medication for the rest of his life. We have claimed an amount of N$ 69,116 on behalf of the client. The client has laid a charge of assault against the police officers concerned (CR. 821/1/94) but the investigations have still not been completed. None of the police officers have yet been charged in court.

(vii) Maliu Ndjunga Kasinga

Maliu Ndjunga Kasinga was arrested on 3 January 1994 at Rundu (northern Namibia), on charges of house breaking and theft. He was assaulted on the same day at the Rundu police station by police officers. He was then taken to this home at Vungu-Vungu near Rundu; his home was searched and he was again assaulted by four police officers. Later the same afternoon he was taken to the Okavango river near Rundu and his head was ducked under the water for lengthy periods of time. He was also kicked in his stomach. He received medical treatment that evening, but these medical records have been lost.

Charges of assault with the intention to do grievous bodily harm were laid against four police officers. Two police officers were convicted. Kalistus Sidimba Mudumbi was sentenced to a fine of N$ 1,000 or 12 months' imprisonment, with a further 6 months' imprisonment suspended for four years. Sandos Tomas Tyameya was sentenced to a fine of N$ 300 or three months' imprisonment.

It is not known whether any disciplinary action was taken against any of the police officers involved.

Civil proceedings have been instituted by the Centre on behalf of Mr. Kasinga. The case is being defended by the Namibian Police and has not yet been finalized or settled.

(viii) L. Musati and J. Kazekondjo

Both clients were arrested and assaulted by police officers outside Club Thriller in Katutura, Windhoek. The name of one of the police officers is Naftali Natangwe, who, according to Musati, has a personal vendetta against him. Both were then detained at the Katutura police station. Musati was detained from 1 to 9 September 1994 and Kazekondjo from 1 to 6 September 1994. Musati was severely assaulted by police officers at the Katutura police station and sustained the following injuries: periorbital oedema and sub-conjunctival haemorrhage and a fractured mandible. His jaws had to be wired for six weeks as a result of these injuries.

Natangwe laid a charge of assault against Musati only after Musati had laid a charge of assault against him. Musati was charged with assault and defeating/obstructing the ends of Justice and was found not guilty on both charges. It is not known what happened concerning the charge that Musati laid against Natangwe. Kazekondjo was not charged at all.

LAC is claiming an amount of N$ 75,000 on behalf of Musati and M$ 35,000 on behalf of Kazekondjo. The trial is due to begin on 28 August 1996.

(ix) Gertzen Kooper

Mr. Kooper was arrested on 10 December 1994 at Katutura, Windhoek for allegedly being in possession of goods presumed to have been stolen. He was detained at the Katutura police station, on the same day. He was assaulted during the evening of 10 December 1994 by a number of his fellow prisoners. Soap was placed in a sock and he was beaten with it. His fellow prisoners hit him in the stomach and he was also kicked and beaten. He shouted for help but to no avail. The cell door had been closed with a heavy steel door and Mr. Kooper banged on that door.

Mr. Kooper repeatedly asked policemen who came to the cell for assistance so that he could receive medical treatment. An investigating officer took a statement from him on the same day, but ignored Mr. Kooper's request that he receive medical treatment.

Mr. Kooper was also not treated on the following day. He was taken to the magistrate's court on 12 December 1994, but did not appear in court because he was too ill. He was sent back to Katutura police station so that he could be taken to hospital. Mr. Kooper only received medical treatment after one o'clock on 12 December 1994, nearly 48 hours after he was assaulted.

A civil action has been instituted against the Namibian Police. Mr. Kooper has claimed damages because the police officers on duty failed to provide him with medical treatment and also because of his wrongful and unlawful arrest and detention.

No criminal charges have been laid against the Namibian Police. It is not known whether any disciplinary proceedings have been instituted against the police officers who failed to respond to Mr. Kooper's request for medical assistance.

(x) Wilhelmina Amesho, Karolina Ashipala, and Johannes Angula

Ms. Wilhelmina Amesho was arrested on 30 August 1995. She was assaulted by members of the Namibian Police at Okatana (northern Namibia) and at the Oshakati police station on the same day. Ms. Amesho was kicked a number of times on her buttocks, generally assaulted and also beaten with a cane by members of the Namibian Police.

Ms. Karolina Ashipala was arrested on 30 August 1995. She was assaulted at Okatana as well as at Oshakati police station on the same day. Ms. Ashipala was slapped, generally assaulted and beaten a number of times with a cane by members of the Namibian Police.

Johannes Angula was arrested on 30 August 1995. He was assaulted near Okatana by members of the Namibian Police on the same day. He was later on the same day again assaulted at the Oshakati police station. Mr. Angula was kicked a number of times in his stomach, chest and on the rear of his body and beaten a number of times with a cane.

All three persons were arrested for allegedly assaulting a police officer.

A disturbing feature of this case is that when the Centre's paralegal officer, Mr. Napoleon Uutoni, accompanied the clients to the Oshakati police station on 12 September 1995 so that criminal charges could be laid against the police officer responsible for the assaults, the police officers on duty in the charge office refused, in the presence of the station commander, to allow charges to be laid. A facsimile was sent to the Inspector-General, who is the head of the Namibian Police, marked for his personal attention on 25 September 1995. There has to date been no response to the facsimile.

Civil proceedings have been instituted against the Namibian Police. These are being defended.

We are not aware of any disciplinary proceedings that may have been instituted against the police officers allegedly involved in the incidents.

Sakaria Frans

Sakaria Frans was arrested at the Wanaheda police station, Windhoek, on 12 November 1995. Mr. Frans was arrested for resisting or wilfully hindering or obstructing a member of the Namibian Police in the exercise of his powers or the performance of his duties (sect. 35 (2) (a) of the Police Act, Act No. 19 of 1990). The charges were withdrawn against Mr. Frans on his first appearance in court on 15 November 1995.

Mr. Frans was taken to a cell by a police officer named Shipululu. Shipululu allegedly told the other 30 to 40 inmates of the cell to beat up Mr. Frans because he was being difficult. A number of the fellow inmates attacked him as soon as he was locked up in the cell. Mr. Frans pulled out a pistol, which he still had on him because he was not searched prior to his incarceration. His assailants retreated and shouted to the police officers outside to help them. Mr. Frans was then pulled out of the cell by two police officers, who were joined by other police officers. Mr. Frans was hit twice on his head with the butt of his gun and generally assaulted by a number of police officers.

Mr. Frans laid criminal charges against the police officers on 14 November 1995. It is not known what progress has been made with the criminal charges. The criminal charges were laid at the District Commissioner's office. It is also not known whether any disciplinary proceedings have been instituted against the police officers.

A civil action has been instituted against the Namibian Police for wrongful and unlawful assault. This action has been defended.

37. The irrefutable fact that emerges from the cases described in paragraphs 35 and 36 above is that alleged instances of torture or inhuman treatment perpetrated by officials of the State are not covered up. Most of them become the subject of judicial proceedings in the courts of Namibia, which enjoy complete independence and are impartial.

Article 13

38. A person who alleges that he or she has been a victim of torture may complain to the Police Department which, as has been stated earlier in this report, is responsible for criminal investigations. And the Department for Criminal Investigations conducts investigations of acts of torture with the same impartiality as they do other acts that are reported to it.

39. Indeed, the Prosecutor-General, who enjoys a great deal of independence and impartiality, can issue instructions to an investigation officer if there is a real likelihood of bias or perfunctory investigation on the part of such investigation officer. If any complainant or witness alleges that his or her rights have been violated during criminal investigations, he or she may complain to the Prosecutor-General who can take the necessary action in the matter. Such complainant or witness may also seek redress by complaining to the Ombudsman or the Court if he or she desires to pursue a judicial remedy. However, regrettably, the Office of the Ombudsman has not measured up to expectations in this regard because it is underresourced and understaffed. There is no record of any case in which the Office has assisted a person to institute a civil action against the Namibian Police, despite the provisions of article 91 of the Constitution which give him such powers.

Article 14

40. The point has been emphasized elsewhere in this report that torture is considered as a serious assault attracting criminal sanction if proven. It is also a delict (tort) for which the victim can institute civil proceedings and claim damages for civil wrong. Even at a criminal trial the complainant may claim and receive compensation if the offence complained of caused damage to or loss of property, including money. Section 300 (1) of the Criminal Procedure Act 1977 (Act No. 51 of 1977) provides:

> "Where a person is convicted by a superior court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss, provided that:
>
> (a) A regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds R 20,000 or R 5,000, respectively."

These provisions are admittedly inadequate, because they do not cover situations where the torture has caused physical or mental injury to the complainant. Indeed, it is the experience of LAC that the provisions are seldom applied. In such cases he or she has the choice of seeking redress in civil proceedings. If he or she cannot afford the services of a private legal practitioner, he or she can apply for legal aid from the Department of Legal Aid of the Ministry of Justice. Besides, LAC has a commendable record of offering legal aid to victims of human rights abuses or delicts simpliciter.

41. There is no formal machinery to deal specifically with compensating victims of torture. Neither is there a formal scheme whereby victims of torture may obtain rehabilitation. The nearest scheme is that contained in our Criminal Procedure Act (Act No. 51 of 1977), referred to in paragraph 40.

Article 15

42. In terms of the common law of Namibia, statements made by a person involuntarily may not be admitted as evidence unless the statement is used as evidence against a person accused of eliciting the statement through any form of duress, including torture. In other words, evidence which is obtained illegally, and torture is illegal, is not admissible. This common law rule has been buttressed by a constitutional provision. Article 12 (1) (f) provides:

> "No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person testimony which has been obtained from such persons in violation of article 8 (2)(b) hereof."

And article 8 (2) (b), as was mentioned in paragraph 2 above, provides:

> "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Article 16

43. The common law on crimes and the constitutional provision prohibiting torture are adequate to a large extent to deal with the detection, prosecution and punishment of acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 of the Convention. Training materials and service manuals in use in the Defence Force and the police and prison services can go a long way in making these officials conscious of the wrongfulness of torture.

44. LAC has observed thus:

> "We do not know of any cases of torture or assault by members of the Namibian Defence Force. We are also not aware of any instances of politically motivated torture. It is to the Government's credit that torture and physical assaults by members of the Namibian Police have reduced considerably since independence. We are nevertheless concerned that incidents are still reported to our offices."

These incidents are outlined in paragraphs 35 and 36 above.

Conclusion

45. This report was compiled by the Ministry of Justice with inputs from members of the Interministerial Committee on Human Rights whose membership is drawn from staff of government ministries and other agencies and from the University of Namibia. LAC also perused the original draft and made very useful comments which have been incorporated in the report.

List of annexes*

1. "Corporal punishment by organs of State of Namibia". Constitutional question referred by the Attorney General to the Supreme Court of Namibia.

2. Extract from the hearing of the case of Mr. A. Nghikembwa versus the Minister of Home Affairs in the High Court of Namibia, 1995.

3. Basic training of police recruits in Namibia.

4. The structure and functions of the Legal Assistance Centre of Namibia founded in 1988.

5. Extradition Bill of Namibia.

6. Extract from the hearing of the case of Mr. M. Matroos in the High Court of Namibia, 1992.

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* The annexes are available for consultation in the archives of the Centre for Human Rights.